/ V.L3372 ORIGINAL

No. 20458

3372

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

-oOo-

DOMINIC PETER GAGLIARDO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

APPELLANT'S OPENING BRIEF

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ATTORNEY FOR APPELLAN

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APPELLANT'S OPENING BRIEF

TO THE CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND TO THE ASSOCIATE JUSTICES THEREOF, AND TO EACH OF THEM:

JURISDICTIONAL STATEMENT

The appellant was indicted by the Grand Jury of the United States District Court for the District of Nevada for violation of Title 18, Section 1464, United States Code (Tr. of Rec. 2).

After a trial by jury the appellant was found guilty of the offense of uttering obscene, indecent and profane language by means of radio communications, regulated by the Federal Communications Commission, in violation of Sec. 1464, Title 18, United States Code, as charged in the indictment (R. T. 123-124).

The appellant was found by the Court to be 23 years of age at the date of conviction and suitable for handling under the Young Adult Offenders Act (18 U.S.C.A. Sec. 4209) and Judgment and Commitment thereunder was docketed on August 3, 1965 (Tr. of Rec. 9).

Pursuant to Title 28, Section 1291, on August 6, 1965, the appellant appealed to this Honorable Court from the verdict of the jury and the judgment and sentence of the lower court (Tr. of Rec. 10).

The validity of Title 18, Section 1464, United States Code, for violation of which the appellant was indicted, was challenged in the lower court by motion to dismiss the indictment (Tr. of Rec. 3) as being unconstitutional and violative of the Tenth Amendment of the United States Constitution as an attempted exercise by the Congress of police power reserved to the State of Nevada and not enacted under any express or implied authority in the United States Constitution.

This statute was enacted on June 25, 1948, being c. 645, 62 Stat. 769. It provides:

> "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisioned not more than two years, or both."

STATEMENT OF THE CASE

The proceedings in this case raise the following questions:

1. Does Title 18, Section 1464, United States Code, violate the Tenth Amendment of the Constitution of the United States as an attempted exercise of police power reserved to the State of Nevada and not enacted under any express or implied authority in the United States Constitution?

2. Can Title 18, Section 1464, United States Code constitutionally be applied to a case in which there is no proof of interstate communication?

3. Did the trial court commit error in charging the jury as to the definition of what constitutes an obscene word or words?

4. Did the trial court err in failing and refusing to charge the jury as to the definition of what constitutes indecent language?

5. Did the trial judge commit a prejudicial error in privately communicating with and instructing the foreman of the jury?

6. Did the trial judge err in failure to ascertain the necessity of further instructions when the jury requested a dictionary.

7. Did the trial judge's private instruction to the jury erroneously remove from the jury the question of

whether or not the acts of the appellant were committed with criminal intent?

8. Was the appellant entitled to a Judgment of Acquittal?

Summary of Proceedings

On May 6, 1965, appellant was indicted by the Grand Jury for the United States District Court for the District of Nevada for violation of Title 18, Section 1464, United States Code it being charged: "That during the month of April, 1965, in Clark County, State and District of Nevada, DOMINIC PETER GAGLIARDO, defendant herein, did utter obscene, indecent, and profane language by means of radio communications over the citizens' band radio network, regulated by the Federal Communications Commission." (Tr. of Rec. 2)

On June 17, 1965, appellant moved to dismiss the indictment on the ground that "Title 18, Section 1464, United States Code, is unconstitutional and violative of the Tenth Amendment of the United States Constitution in that Title 18, Section 1464, United States Code, is an attempted exercise by the Congress of police power reserved to the State of Nevada and was not enacted under any express or implied authority in the United States Constitution, and such enactment is wholly void." (Tr. of Rec. 3) The trial court denied the motion for dismissal (R. T. 3). Later, the trial court instructed the jury that the Government did not have to prove that the radio waves transmitted by defendant traveled out of the State of

Nevada or were heard by people outside of the State of Nevada (Tr. of Rec. 117.)

The case was tried to a jury on June 17, 1965, (R. T. 3-125). At the conclusion of the Government's case the appellant moved for judgment of acquittal upon the grounds, first, "that there is no proof that this conversation was used by any radio network engaged in interstate commerce, or in communicating voice across a state line so as to constitute interstate commerce," and second, that none of the language attributed to the appellant by the Government's witnesses constituted a violation of Title 18, Section 1464, United States Code. (R. T. 67-70) The trial court denied the motion for judgment of acquittal (R. T. 70). Motion of judgment of acquittal was renewed before the case was submitted to the jury and denied (R. T. 122).

Appellant requested the following instruction on the definition of indecent and obscene language:

> "You are instructed that in this case that in order for the language allegedly used by the defendant to be indecent and obscene it must be calculated to excite the animal passions and corrupt and debauch the mind. A communication may be vulgar, abusive, insulting and calculated to arouse angry passions and resentments, but it is not indecent and obscene unless it is calculated to arouse sexual passions and desires."

(Defendant's proposed instruction No. 2, Tr. of Rec. 7)

The trial court gave the following instruction to the jury defining obscene language:

> "An obscene word or words is defined by the Supreme Court of the United States as follows:
>
> > "'If to the average person applying contemporary community standards, the word, or words, have to do with purient, the lewd or the lascivious.'" (R. T. 117)

The appellant objected and excepted to the refusal of the trial court to give the Defendant's Proposed Instruction No. 2 (R. T. 121) and objected and excepted to instruction given by the court on the definition of obscene language (R. T. 121) on the following ground:

> ". . . My ground for objecting to the instruction given by the Court on obscene language is that the instruction, as I interpret it, is the mail fraud instruction and has to do with the rule in determining what printed matter is obscene or is not obscene, and I don't believe is an accurate instruction as to the definition of obscene language as spoken." (R. T. 122)

After the case was submitted to the jury, the

foreman of the jury transmitted two inquiries to the trial judge. The inquiries and copies of the responses made by the judge were filed in the court record and are reproduced at pages 15 and 16 of the Transcript of Record herein.

In the first communication, R. W. Shepherd (Jury Foreman, R. T. 124) inquired: "May we have a dictionary" (Tr. of Rec. 15). On this note appears the notation: "No -" subscribed: "Roger D. Foley." A typewritten copy of the following was also filed in the Court file:

> "I'm sorry but you cannot have a dictionary. You must rely entirely upon the instructions of the Court in considering the evidence in the case.
>
> Roger D. Foley
> U.S.District Judge
>
> COPY
>
> 1.st" (Tr. of Rec. 15)

It should be borne in mind concerning the request for the dictionary, that the appellant challenged the correctness of the definition of obscene language used by the court; that the instruction given by the court did not define the word "indecent," and that the instruction requested by the appellant did define the word "indecent".

The second communication inquired:

"ARE WE TO DETERMINE THE INTENTION
OF THE USE OF PROFANE AND/OR OBSCENE
LANGUAGE OR JUST THE USE OF THE WORDS
OVER A CITIZEN BAND RADIO?"

and was also subscribed "R. W. Shepherd." (Tr. of Rec. 16)

The record shows that the following response was made to the inquiry:

"6-17-65 Memo from Judge Foley Jr. to
Jury in case # 1156

You are to only concern yourself with
whether the Defendant used Obscene,
Indecent or Profane language over the
radio.
You are not to concern yourself with
the reasons or motive for such use.

"Judge Roger D. Foley

JDF/jms
(initialled J.M.S.)
2nd" (Tr. of Rec. 16)

Concerning the inquiry regarding the responsibility of the jury to determine the "intention of the use of profane and/or obscene language," it should be noted that the matter of criminal intent was covered in the original charge to the jury, as follows:

"In every crime, there must exist a union, or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt. With respect to major crimes, such as charged in this case, specific intent must be proved before there can be a conviction. A person who knowingly does an act which the law forbids, intending with bad purpose to disobey or disregard the law, may be found to act with specific intent.

"An act is done knowingly if done voluntarily and intentionally and not because of mistake, accident or other innocent reason." (R. T. 115-116)

The communication made in the trial judges's second response to the jury necessarily obviated the effect of this charge.

The entire proceedings concerning the communication of these inquiries and the responses of the trial judge thereto were conducted without any notice whatever to the appellant or his attorney, who were not present when the inquiries were received or when they were answered, and the first time that they had any knowledge whatever as to the inquiries and responses having been made was on or about August 25, 1965, when examination was made of the official court record in

connection with perfecting the record on this appeal (all as set forth in Appellant's Exhibit No. 1, the affidavit of Harry E. Claiborne, attorney for the defendant and appellant, which is attached hereto, incorporated herein by reference and made a part hereof.) Upon discovery of the same, such inquiries and responses were called for inclusion in the record on appeal herein by supplemental designation. (Tr. of Rec. 13)

The jury returned a verdict finding the appellant guilty as charged in the indictment. (R. T. 123-124).

At the sentencing, the Court found that the appellant was 23 years of age at the date of conviction and suitable for handling as a young adult offender (R. T., Sentence, 5) and appellant was adjudged guilty and sentenced to commitment under the Young Adult Offenders Act (18 U.S.C.A. Sec. 4209) (Tr. of Rec. 9).

Summary of Evidence

Use of Language

The testimony unfolds a story of a 23 year old man of so limited an education that he could not even read (R. T. 81), and who had a speech impediment (R. T. 72). He obtained certain radio equipment and a citizens' band radio license (R. T. 71). He operated the equipment as a hobby, but his hopes for an enjoyable experience did not materialize. He was not personally acquainted with other citizen band

operators, and had no common ground on which to talk with them. (R. T. 84-85) At the time he began his operationsthe channels in use were overloaded, he was an enthusiastic user and anxious to make contacts and friends and was on the air more than many of the operators. Squabbling resulted as to whose turn it was to talk. (R.T. 84-85) Incidents occurred when other operators made fun of the defendant. When he would come on the air and inquire, "How am I coming in?" as many as half a dozen of the operators would respond at once mimicing the defendant's voice. (R. T. 85-86) Most of the conversations the defendant had were with his wife and they would just try as best they could to proceed. (R. T. 86)

Mr. Larry Sartain was another citizens' band operator. (R. T. 31) At the beginning, a friendly relationship existed between the defendant and Sartain; the defendant had visited at Sartain's house (R. T. 32) and Sartain had given him some parts (R. T. 75). Sartain was engaged in selling and servicing fire equipment and had formerly been a police officer of the Las Vegas Police Department for five years (R. T. 36).

The testimony is in conflict as to the deterioration of the friendship. The defendant testified that an incident occurred about the middle of April, 1965, when he was talking to one Bill Empey in Henderson, Nevada, and had trouble with his radio set. He told Mr. Empey he would clear off the air, which he did, and then he went back on the air. (R. T. 72)

He didn't think he was getting out on the air and he called his call letters and asked if anybody was there. (R. T. 72) He still didn't get a reply, so he tried once more. Then his set gave a funny hum and he switched over to a different channel. "Sartain come on and asked me what was the big idea of me talking over them and I told him I was having trouble with my set. I didn't mean to. I was sorry about it, you know. He says, 'You are nothing but a young punk,' and got real smart with me, you know, so I was just talking with him for a minute and I just cut it off. He said, 'I'd like to pin your ears back,' and all this stuff." (R. T. 72-73)

The defendant testified that following that exchange he got off the air and went to work. (R. T. 73) A "kid named Rick" called the defendant and told him that he was supposed to meet Sartain somewhere. (R. T. 73) The defendant turned on his car radio equipment and Sartain came on the set. Sartain asked the defendant "how come I wasn't out at the airport to meet him and I asked him what for and he says, 'Come on out here,' he says, 'I will pin your ears back, I will put you in the place where you belong, you young punk.' I didn't want to argue, I just listened to him. He was telling everybody I didn't show up, I was chicken. I never called him no names." (R. T. 73-74) The defendant testified that the only thing off-color that he said to Mr. Sartain was when Mr. Sartain told him to stay off the air the defendant told him, "You go to hell." (R. T. 74)

The defendant testified to a further incident with Larry Sartain (R. T. 75-77) which occurred at an automobile agency in Las Vegas after the quarrel had occurred between them on the air. At that time Larry Sartain came up to the defendant's car "like a mad man and told me I was nothing but a punk, he wanted to fight. He says, 'If your father wasn't here, I would stomp you right in the ground.'" (R. T. 76) The defendant's father wanted to know what it was all about and Sartain "told my father I was on the air and everything and my father told him I was at work, and I talked to him and told him, you know, I told him if (it) had been me, I wanted to apologize. I don't know what for because I didn't do nothing, so I apologized, okay, me and you are friends and everything. He is standing there talking to me and he starts getting real wise with me again and says 'I can have you arrested right now, see that policeman passing by on the motorcycle, I can have him put you in jail.' I said, 'Go ahead,' and I just walked away fro him. My father was talking to him. Then he left and that is all I heard about it. Then, about three days later, I got picked up at my house on this warrant." (R. T. 76) Immediately after this incident the defendant's father took his radio sets, which were worth about $400.00 and sold them for $75.00 (R. T. 86).

The defendant described incidents in which other operators had come on the air 'horsing around' and identifying themselves by the defendant's call letters (R. T. 74-75). He also described an incident in which Larry Sartain had told anothe

operator named "Donna" that the defendant was passing her home and using his car microphone to cause a loud squeal on her radio set, which the defendant had not done (R. T. 77-78).

The witness Sartain testified that he had talked to the defendant numerous times over the radio and had seen him personally on three occasions--twice at Sartain's home and once in a supply house in Las Vegas. (R. T. 32) He testified that on April 8 about 8:30 or 8:45 P.M. he heard an argument on his home radio equipment and turned the set up and heard the defendant's call letters. (R. T. 33) He heard the defendant say "Goddamnit" and then say to whoever he was talking to, 'If you ever go to a masquerade party, you would not have to dress up, just go as a prick that you are.'" (R. T. 34) After that the defendant was silent, then Sartain talked by radio to the defendant and after Sartain talked to him the defendant said, 'You people have never liked me,' 'I think you are all a bunch of pricks,' then Sartain got back on the air and talked to the defendant again and after Sartain finished talking the defendant said "Fuck you all." (R. T. 35)

On cross examination the witness Sartain testified that the conversation in which the defendant made the remark about the masquerade party was between the defendant and a third party whose identity was unknown to Sartain. (R. T. 40) He further related that he got on the air and told the defendant to "knock it off" after which the defendant said he would

come to Sartain's house, whereupon Sartain told the defendant, "If you want me, I will meet you at Thunderbird Field." Sartain said he then notified the Sheriff's department and went with two Detectives out to Thunderbird Air Field. (R. T. 41) Sartain also testified on this cross-examination that he stayed with the Detectives from the Sheriff's department at Thunderbird Field for half an hour during which time Sartain was broadcasting from his car radio and said the following: "Dominic, I am out here, come on out here, what is wrong with yo If you want to fight me, I am out here, what is wrong with you, are you a coward; why aren't you here?" (R. T. 42-43)

Other citizens' band radio operators testified they heard the quarrel over the radio between the defendant and Sartain (Bryant, R. T. 11-12; Empey, R. T. 23; Prisbrey, R. T. 48; Newman, R. T. 54-56). All of them understood that the things said by the defendant were said in the heat of anger; nearly all of them understood that the comment about the masquerade party was specifically directed to Sartain.

The witness Francis Fuson testified that he was engaged in appliance service and two-way radio sales and service. He was a citizen's band radio operator. He was familiar with the difficulties the defendant had in making contact with other operators interesting in talking back nd forth with the defendant (R. T. 85-86), and he described nother incident revealing the quarrelsome nature of the itness Sartain:

"* * * one that took place with me the night the

Bonanza Airplane crashed out here * * *
My son was in our fourwheel drive vehicle
out with a great many other people trying
to locate the plane and I was trying to
talk to him and Larry (Sartain) invited
me to get off the air. He called me up the
next day and apoligized for it, which I
though was real nice of him, but we locked
horns for a few moments.

Q What did he say to you when he
told you to get off the air?

A Well, as I recall, he asked me to
shut my goddam mouth and get the hell off
the channel." (R. T. 88)

The witness James McCalum testified that he purchased the defendant's radio equipment and that about three or four days after the defendant was indicted McCalum heard somebody come on the air using the defendant's call letters. (R. T. 91-92)

Non-Interstate Character of Radio Transmission

The witness Francis Fuson testified that he was engaged in the business of appliance service and two-way radio sales and service (R. T. 82); that the Citizen's Band radio network is a short range, low cost communication service that was established by the FCC in 1958 (R. T. 82) and that the

normal range of a three and a half watt system is ten to twenty-five miles (R. T. 83).

The witness Weldon Empey testified that under normal conditional a three and a half watt system is used to communicate "just in the vicinity" as "the City of Las Vegas and Henderson". (R. T. 29)

There was no testimony whatever that the broadcasts were interstate in character.

SPECIFICATIONS OF ERROR

1. Title 18, Section 1464, United States Code (c. 645, 62 Stat. 769) is unconstitutional and void in that it is an attempted exercise of police power reserved to the States under the Tenth Amendment to the United States Constitution and was not enacted under any express or implied delegation of power under the Constitution of the United States.

2. As to the appellant, Title 18, Section 1464, United States Code (supra), is unconstitutional and void as not charging any offense involving interstate radio transmission or communication.

3.* The trial court erred in failing and refusing to instruct the jury in accordance with Defendant's Proposed Instruction No. 2 (Tr. of Rec. 7).

4.* The trial court erred in instructing the jury that language is obscene if it has "to do with the purient, the lewd and the lascivious." (R. T. 117)

5.* The trial court erred in failing and refusing to instruct the jury as to what constitutes the use of indecent language. (Tr. of Rec. 7)

6.* The lower court erred in failing to inform the appellant and his attorney of the request for a dictionary and in failing to ascertain the need for supplementary instructions.

7.* The lower court erred in privately communicating with and privately instructing the jury.

8.* The supplemental instruction, given privately to the jury, erroneously took the factual question from the jury of whether or not the acts of the appellant were committed with criminal intent.

9. The lower court erred in refusing to grant the appellant's motions for acquittal.

* Explanatory Note: With respect to Specifications of rror Nos. 3, 4 and 5, the text of the proposed instruction ubmitted by the defendant, the instruction given by the court, nd the record of the grounds of defendant's objections and xceptions is contained under the Statement of the Case begining .th the last paragraph on page 5; As to Specifications of Error os. 6, 7, and 8, the record of the proceedings is set forth der the Statement of the Case beginning at page 6, on the last ne and continuing through page 10.

ARGUMENT

POINT ONE

TITLE 18, SECTION 1464, UNITED STATES CODE, VIOLATES THE TENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS AN ATTEMPT TO EXERCISE POLICE POWER NOT BELONGING TO THE CONGRESS BUT RESERVED TO THE STATES

The argument under this point considers these Specifications of Error:

1. Title 18, Section 1464, United States Code (c. 645, 62 Stat. 769) is unconstitutional and void in that it is an attempted exercise of police power reserved to the States under the Tenth Amendment to the United States Constitution and was not enacted under any express or implied delegation of power under the Constitution of the United States.

2. As to the appellant, Title 18, Section 1464, United States Code (supra), is unconstitutional and void as not charging any offense involving interstate radio transmission or communication.

Title 18, Section 1464, United States Code (c 645, Stat. 769) provides as follows:

"Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

This statute was enacted June 25, 1948, as part of the federal criminal code. At an earlier time, a prohibition against the use of such language was contained in Section 29 of the Radio Act of 1927 (47 U.S.C.A Section 109) and a penalty for violation of the act was contained in Section 33 of the Radio Act of 1927 (47 U.S.C.A. Section 113). These provisions were before this Honorable Court in the case of

DUNCAN v. UNITED STATES, CA 9th, 1931
48 F.2d 128,

where the defendant was indicted for "knowingly, unlawfully, willfully, and feloniously uttering obscene, indecent, and profane language by means of radio communication and by interstate radio transmission from his radio broadcasting station known as KVEP situated in Portland, within the state and district of Oregon. (48 F.2d 129) (Emphasis supplied) It was alleged in that case that this broadcasting extended beyond the limits of the state of Oregon and reached other states within the United States. In that case it was conceded by the appellant that the Congress had the right to regulate interstate communication by radio, but he contended that the prohibition of the use of obscene language over the radio in such interstate commerce was not a regulation of that

commerce, but was a matter which lay solely within the police power of the state. The force of the decision in Duncan is to recognize that the Radio Act of 1927 was a regulation of interstate commerce and that in such regulation Congress may validly exercise police power which in the absence of the delegation of power to Congress under the interstate commerce clause could only be exercised by the states.

These provisions of the Radio Act of 1927 were repealed by the Federal Communications Act of 1934 (Act June 19, 1934, c. 652, Section 602(a), 48 Stat. 1102).

Federal Communications Act of 1934 contained a prohibition against the utterance of obscene, indecent or profane language by means of radio communication (June 19, 1934, c. 652, Section 326, 48 Stat. 1091) which was preceded by the following language:

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

By the Act of June 25, 1948, c. 645, Section 21, 62 Stat. 862, Section 326 of the Federal Communications Act (47 U.S.C.A. Section 326) was amended by deleting the language

prohibiting the utterance of obscene, indecent or profane language by means of radio communication.

The result of these Congressional Acts was to remove the offense of uttering obscene, indecent or profane language from the shelter of an act specifically regulating interstate commerce, and to attempt to make the crime stand alone, without any reference whatever to the regulation of interstate commerce or to the exercise of any other power delegated to the Congress by the United States Constitution.

The only provision remaining in the Federal Communications Act which purports to deal with the use of such language is contained in Title 47, U.S.C.A. Section 303, (m) (1) where it is provided that the Federal Communication Commission shall:

> (m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee--
>
> * * *
>
> (D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning,* * *

Thus, in the only place where Congress could appropriately prohibit the use of obscene and profane language and impose a penalty in the exercise of police power, in the regulation of interstate commerce, Congress has provided that in such case the operator's license may be suspended, and has imposed no

criminal sanction whatsoever.

The result of this is that whenever such utterance occurs in interstate commerce, the sole regulation which can be invoked is license suspension. The prohibition of such an utterance, other in interstate commerce, is a matter which lies solely within the police power of the several states.

Moreover, this is an area in which the State of Nevada has exercised its police power:

§193.180, Nevada Revised States, provides:

"193.180 Common law crimes: Fines.

1. All offenses recognized by the common law as crimes, and not enumerated in NRS, shall be punished:

(a) In cases of felonies, by imprisonment in the state prison for a term not less than 1 year nor more than 5 years.

(b) In cases of misdeameanors, by imprisonment in the county jail for a term not exceeding 6 months nor less than 1 month, or by fine not exceeding $500, or both.

2. Whenever any fine is imposed for any felony or misdeameanor, whether such be by statute or at common law, the party upon whom the fine is imposed shall be committed to the county jail, when not sentenced to the state prison, until the fine is paid; and he shall be imprisoned at the

rate of 1 day for each $2 until such fine is paid."

In the case of

WINTERS v. PEOPLE OF STATE OF NEW YORK,

333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665,

it was recognized that acts of gross and open indecency or obscenity, injurious to public morals, were indictable at common law, citing 1 Bishop, Criminal Law, 9th Ed., Section 500; Wharton, Criminal Law, 12th Ed., Section 16.

Section 266.350, Paragraph 5, Nevada Revised Statutes authorizes the city governments of Nevada:

"To provide for the punishment of persons disturbing the peace and good order of the city or any lawful assembly, by clamor or noise or by intoxication, fighting or using obscene or profane language, or otherwise violating the public peace by indecent or disorderly conduct, or by lewd or lascivious behavior."

In the exercise of this power, the City Code Las Vegas in Sections 6-1-18, 6-1-32 and 6-1-28 punishes as sdemeanors, respectively: Immodest, Improper or Indecent havior; Singing Lewd or Obscene Songs; and Profane or scene Language.

The constitutional principles which must govern

the determination under this point are simple and direct:

(1) The federal government does not have general police power, and the authority of Congress to enact penal stututes must be found in the United States Constitution. This is the holding of the following cases:

BARBIER v. CONNOLLY, 1884, 113 U.S. 27, 28 L.Ed. 923, 5 S.Ct. 357;

LINDER v. UNITED STATES, 1925, 268 U.S. 5, 45 S.Ct. 446, 69 L.Ed. 819, 39 A.L.R. 229

AMERICAN FEDERATION OF LABOR v. WATSON, D.C., Fla., 1945, 60 F.Supp. 1010;

UNITED STATES v. RENKIN, D.C., S.Caro., 1944, 55 F.Supp. 1; and

UNITED STATES v. ERAMDJIAN, D.C., Cal., 1957, 155 F.Supp. 914.

2) In the absence of constitutional authority, a federal enal statute which purports to define a crime and establish penalty for its commission, is void as an unlawful attempt o exercise police power reserved to the several States under he Tenth Amendment ot the United States Constitution, as was eld in the following cases:

HAMMER v. DAGENHART, 1918, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101, 3 A.L.R. 649, Ann.Cas. 1918E, 724;

KELLER v. UNITED STATES; ULLMAN v. UNITED STATES, 1909, 213 U.S. 138, 29 S.Ct. 470, 53 L.Ed. 737;

Ex Parte LAIR, D.C., Kan., 1910, 177 F. 788;

O'KELLEY v. UNITED STATES, CA 8th, 1941,
116 F.2d 966.

Under these governing principles, Title 18. Section 1464, United States Code, under which appellant was indicted and convicted, is unconstitutional and void.

The constitutional question was raised in the lower court by a motion to dismiss the indictement (Tr. of Rec. 3-6) which was erroneously denied by the lower court (R. T. 3).

The lower court also erred in refusing to grant the appellant's motion for judgment of acquittal at the conclusion of the Government's case (R. T. 67-70) which was renewed before the case was submitted to the jury (R. T. 122) on the ground that there was no proof the conversation was used by any radio network engaged in interstate commerce, or in communicating voice across a state line so as to constitute interstate commerce.

POINT TWO

THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON APPELLANT'S THEORY OF THE CASE AND REFUSED TO CHARGE THE JURY AS TO THE CORRECT TEST AS TO WHAT CONSTITUTES THE USE OF OBSCENE AND INDECENT LANGUAGE WITHIN THE MEANING OF THE LAW.

This point considers the following Specifications of Error:

3. The trial court erred in failing and refusing to instruct the jury in accordance with Defendant's Proposed Instruction No. 2 (Tr. of Rec.

4. The trial court erred in instructing the jury that language is obscene if it has "to do with the purient, the lewd and the lascivious." (R. T. 1

5. The trial court erred in failing and refusing to instruct the jury as to what constitutes the use of indecent language.

The appellant requested the trial court to give the ollowing instruction to the jury:

"You are instructed that in this case that in order for the language allegedly used by the defendant to be indecent and obscene it must be calculated to excite the animal passions and corrupt and debauch the mind. A communication may

be vulgar, abusive, insulting and calculated to arouse angry passions and resentments, but it is not indecent and obscene unless it is calculated to arouse sexual passions and desires." (Tr. of Rec. 7)

The trial court rejected this instruction and gave the following as its only instruction on the subject:

"An obscene word or words is defined by the Supreme Court of the United States as follows:

"'If to the average person applying contemporary community standards, the word, or words, have to do with the purient, the lewd or the lascivious.'" (R. T. 117)

The appellant's proposed instruction was adapted from the opinion of this Court in the case of:

DUNCAN v. UNITED STATES, CA 9th, 1931, 48 F.2d 128.

That case held that the test in determining whether the language of a radio broadcast is obscene or indecent is whether it would arouse lewd or lascivious thoughts in the minds of the hearers, and that although the language used may be abusive and objectionable, it is not indecent or obscene unless it excites libidinous thoughts in the minds of the hearers. The Court approved and quoted the following expressions of the test:

"In construing the word 'obscene,' as used

therein, it has been uniformly held that, if the matter complained of were of such a nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires, it is within the probition of the statute, and that whether or not it had such tendency was a question for the jury. MAGON v. UNITED STATES, 248 F. 201, 203.

"The communication in the instant case is vulgar, abusive, insulting, and one calculated to arouse angry passions and resentment, but not sexual passions or desires." UNITED STATES v. DAVIDSON, 244 F. 523, 529.

"It seems to me that the statute under consideration was intended to prohibit dissemination by the mails of printed or written matter or pictorial productions calculated to excite the animal passions, and to corrupt and debauch the mind, and not such as are merely coarse, vulgar, or indecent in the popular sense of those terms." UNITED STATES v. MALES, 51 F. 41, 43.

commenting on the language used in the case of United States Males, supra, this Court stated:

"* * * the language used, although coarse, ulgar, and indecent, was not within the purview of the statute ecause its tendency was to excite, anger and condemn and repel ather than excite feelings of an impure, lascivious, or un-haste character." (Duncan v. United States, supra, at p. 132) he court's instruction completely ignored the crucial part of he legal test--the jury was not allowed to determine whether r not the language used was calculated to excite and arouse nimal and sexual passions and desires or whether, though it ight have been vulgar, abusive and insulting, it was calculated o arouse angry passions and resentments.

It was the appellant's theory of the case that atever language he may have used was used in the heat of a arrel between appellant and another citizen's band operator, rry Sartain, and while the statements he made may have been proper, even vulgar and abusive, nevertheless they did not nstitute obscene or indecent language because they were cal-lated only to insult the hearer or arouse angry resentment.

The trial court refused to instruct according to is theory, instead charging the jury to determine only whether e words "have to do with the purient, the lewd or the lascivious.

One of the great perplexities in law is to define e legally proscribed area of communications, whether books, ries, pictures, songs or spoken language, having regard to ual organs or sexual practices. Whether or not such a com-ication is legally to be proscribed depends upon the attitude

nd intention of the actor, and upon the effect the communi-
ation is calculated to have upon the hearer or other recipient.

In the present case, the trial court made no at-
empt to deal with the problem; it placed criminal liability
n the shoulders of the defendant if any of the language used
y or attributed to him "had to do with" the purient, the lewd
r the lascivious. It ignored the attitude and the intention
f the defendant, and it ignored what effect the language was
alculated to have upon the hearer.

As has already been set forth under the summary
f the evidence contained in the Statement of the Case herein,
itness after witness--all those for the Government as well as
hose for the appellant--testified that the language used by
he appellant occurred in the course of a quarrel on the air.
he remarks made by the appellant were not part of any program
o corrupt the morals of the hearers, or to incite lewd or
scivious thoughts in the minds of the hearers. They were
lculated to insult Mr. Sartain and those of the hearers who
d mimiced and made fun of the appellant. In refusing to in-
ruct according to the appellant's theory of the case, which
s supported by <u>all</u> the evidence in the case, the appellant
s deprived of his defense.

This constitutes reversible error:

LUFTY v. UNITED STATES, CA 9th, 1952,
198 F.2d 760:

LEVINE v. UNITED STATES, U.S.App.D.C., 1958, 261 F.2d 747.

The impact of these errors taken in conjunction ith the private communications made between the trial judge nd the foreman of the jury is one of extraordinary prejudice. he error in making of these communications, and the giving f a private instruction to the jury, is considered in full nder the next point of this brief. Among other matters which ranspired, the trial judge privately sent a memorandum note o the jury telling them, in effect, to disregard the defen- ant's intention in making the statements and to find him guilty f he used obscene, indecent or profane language over the radio. Tr. or Rec. 16)

The trial court had given a general instruction n criminal intent (R. T. 115-116) but even this was stripped rom him when the private instruction was given. As was held n the following cases:

MORISSETTE v. UNITED STATES, 1952, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288;

BLAND v. UNITED STATES, CA 5th, 1962, 299 F2d 105;

BLUNT v. UNITED STATES, U.S.App.D.C., 1957, 244 F.2d 355;

FOSTER v. UNITED STATES, CA 9th, 1956, 237 F.2d 617;

UNITED STATES v. CHRISTMANN, CA 2d, 1962, 298 F.2d 651;

his was fatal error.

POINT THREE

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE OF PREJUDICIAL COMMUNICATIONS AND INSTRUCTIONS MADE PRIVATELY TO THE JURY BY THE TRIAL JUDGE

This point considers the following Specifications of Error:

6. The lower court erred in failing to inform the appellant and his attorney of the request for a dictionary and in failing to ascertain the need for supplementary instructions.

7. The lower court erred in privately communicating with and privately instructing the jury.

8. The supplemental instruction, given privately to the jury, erroneously took the factual question from the jury of whether of not the acts of the appellant were committed with criminal intent.

After the jury had begun its deliberations, there was an exchange of communications between the foreman of the jury and the trial judge. The circumstance of the occurrences and the content of the communications is set forth under the Statement of the Case at length. The writings exchanged appear at pages 15 and 16 of the Transcript of Record. The entire matter occurred without any form of notice to the appellant or his counsel whatever, and not in open court.

(Appellant's Exhibit 1)

In the first communication the foreman of the jury inquired if the jury might have a dictionary. The trial judge responded, by a written memorandum, that the jury could not have a dictionary and must rely entirely upon the instructions of the Court in considering the evidence. (Tr. of Rec. 15) The record is barren of any indication that the trial judge made any attempt to ascertain why the request for a dictionary was made.

In the second communication the following writing was directed to the judge:

> "ARE WE TO DETERMINE THE INTENTION OF THE USE OF PROFANE AND/OR OBSCENE LANGUAGE OR JUST THE USE OF THE WORDS OVER A CITIZEN BAND RADIO?"

to which the judge replied:

> "6-17-65 Memo from Judge Foley Jr. to Jury in case #1156
>
> You are to only concern yourself with whether the Defendant used Obscene, Indecent or Profane language over the radio.
>
> You are not to concern yourself with the reasons or motive for such use." (Tr. of Rec. 16)

As to the first exchange regarding the dictionary, it was prejudicial error for the trial court not to inform the appellant and his attorney of the fact of the inquiry and to

bring the jury back into court to determine what was causing their confusion or uncertainty. WRIGHT v. UNITED STATES, U.S.App.D.C., 1957, 250 F.2d 4. Especially is this true in view of the total absence of any instruction on what constitutes indecent language unter the law, and the erroneous test the court gave on obscene language.

As to the second exchange, it must be borne in mind that the court had already refused to charge the jury according to the defendant's theory, to the effect that language which is merely calculated to abuse, insult or arouse angry resentment, does not constitute obscene or indecent language under the law, even though the language used is vulgar. (Tr. of Rec. 7) The only instruction left to the defendant was the general one on criminal intent (R. T. 115-116) and this was stripped from him by the judge's memorandum to the jury which equated "intention" with "reason and motive" and directed the jury to disregard the same. This amounted virtually to taking the case from the jury and directing it to return a verdict of guilty.

The law on this point is crystal clear. It was laid down in the case of

FILLIPPON v. ALBION VEIN SLATE CO., 1919, 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed. 853,

as follows:

"We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard,

entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is empaneled until it is discharged after rendering the verdict. Where a jury has retired to consider of their verdict, and supplementary instructions are required either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction * * * (Citing cases.)"

SHIELDS v. UNITED STATES, 1927, 273 U.S. 583, 47 S.Ct. 478, 71 L.Ed. 787,

the requirements for civil procedure established in FILLIPPON v. ALBION VEIN SLATE CO., supra, were applied a fortiori to a criminal case.

This Court held in the case of:

AH FOOK CHANG v. UNITED STATES, CA 9th, 1937, 91 F.2d 805

that the giving of a supplemental instruction by the trial judge to the foreman of the jury in the judge's chambers was reversible error on both procedural and substantive grounds, saying:

> "* * * appellants were entitled to be personally present at every stage of the trial* * * (citing cases)* * * They could have waived that right by voluntarily absenting themselves from the trial, since they were not in custody* * * (citing cases)* * * But a trial is supposed to take place in a courtroom, and here even if appellants had been in the courtroom, this proceeding would not have taken place in their presence, for it took place in the judge's chambers. If appellants had absented themselves from the courtroom voluntarily, they would have thus consented to the proceeding in the courtroom, but not at some other place* * *"

As to the second ground for reversal, the Court ted the general rules as to a showing of prejudice. Where

the record shows affirmatively that the appellant was prejudiced, there is reversible error; if the record does not show whether the error is prejudicial or not, it is presumed to be prejudicial and requires reversal. In Ah Fook Chang the particular instruction given to the juror to be relayed to the others was not prejudicial per se; nevertheless, reversible error resulted in the instruction being given to the jury in the jury room rather than by the judge in open court with the appellant and his counsel present. Moreover, since it could not be known whether or not the juror correctly repeated the judge's instruction, and since the chance of error was so great where the jury received a "second-hand" instruction, prejudice would be presumed.

The Court will not need to resort to a presumption of prejudice in this--the prejudice and the error are obvious.

See also:

JONES v. UNITED STATES, U.S.App.D.C., 1962, 308 F.2d 307.

McCLANAHAN v. UNITED STATES, CA 5th, 1959, 272 F.2d 663.

FINA v. UNITED STATES, CA 10th, 1931, 46 F.2d 643.

POINT FOUR

THE EVIDENCE ESTABLISHED, AS A MATTER OF LAW, THAT THE APPELLANT WAS NOT GUILTY OF THE CRIME CHARGED, AND HE IS ENTITLED TO A JUDGMENT OF ACQUITTAL.

This point deals with the following Specification of Error:

9. The lower court erred in refusing to grant the appellant's motions for acquittal.

The evidence in this case has already been summarized for the court under the Statement of the Case. It will not be repeated here, but culling from it everything which can be looked to to support a conviction, here is what there is:

The Government witness ORBY BRYANT testified that he had a private detective agency and patrol (R. T. 6); that the witness Sartain was an old friend he had known for twenty years (R. T. 14). He testified that during a heated argument the defendant stated about one of the subjects he was talking to, "if this subject went to a masquerade party, he wouldn't have to wear a costume, as he could go as a prick". (R. T. 11) The defendant called the subject a "bastard" and the witness was "almost positive" he called him a "son-of-a-bitch". (R. T.12)

POINT FOUR

THE EVIDENCE ESTABLISHED, AS A MATTER OF LAW, THAT THE APPELLANT WAS NOT GUILTY OF THE CRIME CHARGED, AND HE IS ENTITLED TO A JUDGMENT OF ACQUITTAL.

This point deals with the following Specification of Error:

9. The lower court erred in refusing to grant the appellant's motions for acquittal.

The evidence in this case has already been summarized for the court under the Statement of the Case. It will not be repeated here, but culling from it everything which can be looked to to support a conviction, here is what there is:

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The Government witness WELDON EMPEY testified that he was a mechanic and as a hobby engaged in radio experimentation. (R. T. 17) This witness testified he heard the defendant say "to the party that was evidently--well, to somebody, that he was talking to, 'Don't bother changing your clothes, just come as the big prick that you are.'"

The Government witness LAWRENCE CHARLES SARTAIN sold fire equipment and had been a city policeman for five years (R. T. 36). He turned on his radio receiver and heard the defendant arguing with somebody (R. T. 33). In the course of this argument he heard the defendant say: "Goddamnit" and "If you ever got to a masquerade party, you would not have to dress up, just go as a prick that you are." (R. T. 34) After the witness Sartain turned on his transmitter and addressed some remark or remarks to the defendant, the defendant said: "You people have never liked me, I think you are all a bunch of pricks." (R. T. 35) After more remarks by the witness Sartain to the defendant, the defendant said: "Fuck you all." (R. T. 35)

The Government witness WALDO LORIN PRISBREY testified that he was a mechanical technician for Lawrence Radiation Laboratory (R. T. 45). He overheard an argument taking place about a meeting "at the old airport, which I assume was the Thunderbird Field, and through the course of the argument he told the other fellow, Dominic (Defendant) told the other fellow not to dress up or anything, to just come dressed as the prick that he already was." (R. T. 48) This witness had heard the

witness Sartain talking before on the radio when he felt Sartain "was shook up", and he felt Sartain was "shook up at this time". He and the defendant were talking quite loud. (R. T. 50)

The Government witness MRS. DONNA NEWMAN testified she heard the witness Sartain talking to the defendant and the defendant stated to Mr. Sartain, "If ever he went to a masquerade party, he wouldn't have to get a costume, he could just go as the prick he was." (R. T. 54) This witness also testified: "They (Sartain and Defendant) were both pretty well upset and like I say, I have known Larry (Sartain) for a longtime and I have never actually known him to come to blows with anyone, so I don't know, I just figured, well, here we go again." (R. T. 61-62)

The defendant DOMINIC PETER GAGLIARDO testified that a quarrel occurred between him and the witness Sartain, who told the defendant, among other things, to stay off the air to which the defendant replied: "You go to hell." (R. T. 74

The defense witness FRANCIS L. FUSON testified he was in the business of appliance service and two-way radio sales and service (R. T. 82). He testified to a verbal altercation between himself and the witness Sartain which happened before the events in this case in which the witness Sartain told the witness Fuson "to shut my goddam mouth and get the hell off the channel". (R. T. 88)

Was any of this language obscene, indecent or

profane in the meaning of the law?

The test of what constitutes the use of obscene or indecent language, taken from the case of DUNCAN v. UNITED STATES, CA 9th, 1931, 48 F.2d 128, as stated in Defendant's Proposed Instruction No. 2, (which the trial court rejected) is as follows:

> "You are instructed that in this case that in order for the language allegedly used by the defendant to be indecent and obscene it must be calculated to excite the animal passions and corrupt and debauch the mind. A communication may be vulgar, abusive, insulting and calculated to arouse angry passions and resentments, but it is not indecent and obscene unless it is calculated to arouse sexual passions and desires."
> (Tr. of Rec. 7)

The lower court correctly stated the law on what constitutes profanity in the charge to the jury:

> "Profane language, as used in this case, must be such language as shows irreverence toward God or Holy things. In other words, the language used must import imprecation of divine vengeance or implying divine condemnation. Regardless of how offensive the word may be, it is not profane unless such language is irreverent toward God or Holy things." (R. T. 117)

Everything the defendant said or is reputed to have said was done in the course of heated argument. There is no evidence that the defendant made any statements for the purpose of or which were calculated to arouse sexual passions or desires. There is no evidence that the remarks of the defendant tended to arouse any lewd, lascivious or purient thoughts in the minds of the hearers. As noted above, everyone of them recognized that matter for what it was--a heated argument. The statements attributed to the defendant were calculated only to anger the hearer or hearers they were addressed to.

As to profanity, this illiterate boy (R. T. 81), in his anger, simply adverted to expressions commonly used to express anger. The expressions attributed to him are so commonly used that this court could take judicial knowledge that such expressions, in the context in which they were employed, do not show an "irreverence toward God or Holy things", they do not import "imprecation of divine vengeance" or imply "divine condemnation."

The only witness who testified to any use of language by the defendant which could be relied on by the Government testified he heard the defendant say "Goddamnit". None of the other Government witnesses who heard the broadcast mentioned the defendant using such expression. The defendant testified that he did say to Sartain in their quarrel, "You go to hell".

If the defendant did say "Goddamnit", it is not

established what he was referring to, if anything. The authorities on profanity are collected in the case of DUNCAN v. UNITED STATES, CA 9th, 1931, 48 F.2d 128, beginning at p. 133. In every instance in which the word "damn" was held to be an exercise of profanity, it was profane against God as invoking condemnation. Thus: "I can whip any damn Groover of the name." (Roberts v. State, 120 Ga. 177, 47 S. E. 511); referring to another as "damned old rascal" (Holcomb v. Cornish, 8 Conn. 375), referring to the church Sunday school, "Well, the damn thing is done broke up," Orf v. State, 147 Miss. 160, 113 So. 202. In the Duncan case itself, the defendant referred to an individual as "damned", he used the expression "By God" irreverently, and he announced his intention to all down the curse of God upon certain individuals. Clearly, an isolated expression "Goddammit" being unrelated to any person or thing, does not constitute profanity, within the meaning of the law.

As to the expression, "You go to hell," in the case of SANFORD v. STATE, 91 Miss. 158, 44 So. 801, noted in the Duncan opinion, it was held that the language: "Go to hell, you low down devils," did not violate the statute, since, "upon strict construction, which is required of the courts, it lacks any 'imprecation of divine vengeance' and does not 'imply divine condemnation.'" This was "simply a rude request or order to go to hell, with no necessity to obey, no power to enforce obedience, and no intimation that the irresistible Power had condemned, or was invoked to condemn, them to go to hell."

It has already been noted that there was no proof in this case that the broadcast was used by any radio network engaged in interstate commerce, or in communicating voice across a state line so as to constitute interstate commerce. The defendant's motion for judgment of acquittal was based on the grounds of the non-interstate character of the broadcast and upon the ground that the language attributed to the defendant was not, in law, obscene, indecent or profane. (R. T. 67-70, 122) The motion was correct, the lower court erred in denying it, and the conviction should be reversed, and the case should be remanded with direction for entry of a judgment of acquittal.

CONCLUSION

The writer of this brief was the attorney for the defendant at the trial. He opened his address to the jury with the statement: "This is one of the cases that gives you the idea of wondering why you are here." All the power, strength and ceremony of a federal jury trial was invoked to bring a twenty-three old illiterate boy, and a novice in the way of radio use, to the bar of justice for some intemperate remarks made in anger over a ham radio transmitter to another ham radio operator, and heard by a necessarily limited number of people in the immediate locality of the City of Las Vegas, Nevada.

In the exercise of all this power, strength and ceremony, the trial court, after denying the defendant's motion to dismiss the indictment by reason of the unconstitutionality of the federal statute under which the defendant was indicted, refused to instruct the jury on the defendant's theory of the case; gave the jury an erroneous test of what constitutes the use of obscene language; gave no test as to what constitutes the use of indecent language; refused to grant the defendant a judgment or acquittal when the evidence, in its entirety, showed that the defendant did not intentionally use language which was either obscene, indecent or profane; and, finally, engaged in a course of private communications with the foreman of the jury, in which the jury was, in effect, instructed to

disregard the intention of the use of profane or obscene language, or both, and, virtually, to come back with a verdict of guilty.

This conviction should not be allowed to stand.

Respectfully submitted:

HARRY E. CLAIBORNE
108 South Third Street
Las Vegas, Nevada

ATTORNEY FOR APPELLANT

4. Appellant filed the notice of appeal herein on ;ust 6, 1965 (Tr. of Rec. 10).

5. On or about August 25, 1965, an examination was le of the official court record in connection with perfecting record on this appeal, when, for the first time, your Affiant covered the existence of the written memoranda exchanged between trial judge and the jury foreman reproduced at pages 15 and of the Transcript of Record.

6. These memoranda were immediately called for inclusion the record on this appeal by the filing of a supplemental ignation of record (Tr. of Rec. 13).

7. If your Affiant had known of the communications, he .d have requested that the trial judge ascertain the cause of jury's uncertainty which led them to request the use of a ionary, and would have submitted to the court whatever lemental instructions as were deemed necessary.

8. If your Affiant had known of the communications, he d have submitted a requested supplemental instruction in onse to the jury's question as to whether it should concern lf with the intention of the use of profane or obscene uage, and would have requested the Court to repeat the uctions favorable to the defendant as made in the original e to the jury, and would have renewed his request that the be instructed in accordance with Defendant's Proposed uction No. 2 (Tr. of Rec. 7).

9. If your Affiant had been made aware of the existence e communications before taking the appeal herein, he would

APPELLANT'S EXHIBIT NO. 1

No. 20458

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NIC PETER GAGLIARDO,	)
	)
Appellant,	)
	)
vs.	)
	)
ED STATES OF AMERICA,	)
	)
Appellee.	)
	)

AFFIDAVIT OF COUNSEL

E OF NEVADA)
) ss.
NTY OF CLARK)

HARRY E. CLAIBORNE, being first duly sworn, upon his deposes and says:

1. He is the attorney for the appellant in the above-led cause, and was the attorney for the appellant in this case e United States District Court for the District of Nevada.

2. After the case was submitted to the jury and during deliberations, an exchange of communications took place between foreman of the jury and the trial judge (Tr. of Rec. 15, 16)

3. Neither the appellant herein, nor your Affiant, were et when any of these communications took place, and they were notified that any inquiries were made of the trial judge or ed by him, and the same did not take place in open court.

e moved the lower court for a new trial.

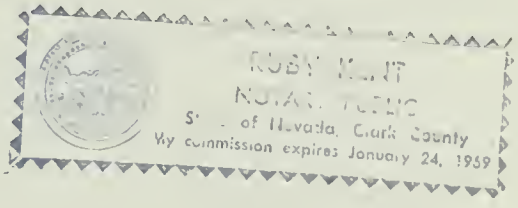
Harry E. Claiborne

HARRY E. CLAIBORNE
108 South Third Street
Las Vegas, Nevada
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN to before me this 26th day of
ber, 1965.

Ruby Kent

NOTARY PUBLIC



CERTIFICATE

I hereby certify that in connection with the
paration of this brief, I have examined Rules 18 and 19
the United States Court of Appeals for the Ninth Circuit
that, in my opinion, the foregoing brief is in full compliance
those rules.

Harry E. Claiborne

HARRY E. CLAIBORNE
ATTORNEY FOR APPELLANT

PROOF OF SERVICE

RECEIPT OF THREE COPIES of the foregoing brief,
her with Appellant's Exhibit No. 1, is hereby acknowledged
26th day of October, 1965.

JOHN W. BONNER
UNITED STATES ATTORNEY

By Robert D. Timmell
ATTORNEY FOR APPELLEE